Supreme Court, U.S.
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No. 02-1633

IN THE

Supreme Court of the United States

MAHER W. SOLIMAN,

Petitioner,

v.

PHILIP MORRIS U.S.A., INC., ALTRIA GROUP, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T INDUSTRIES P.L.C., LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH – U.S.A., INC., THE TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50 INCLUSIVE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PHILIP MORRIS U.S.A., INC., ALTRIA GROUP, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, THE COUNCIL FOR TOBACCO RESEARCH – U.S.A., INC., AND THE TOBACCO INSTITUTE, INC.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are accurately set forth in the petition for a writ of certiorari.

Respondent Philip Morris USA, Inc. (formerly known as Philip Morris Incorporated) has the following parent corporation: Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA's stock.

Respondent Altria Group, Inc. (formerly known as Philip Morris Companies, Inc.) has no parent corporations. No publicly held companies own 10% or more of its stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.). R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc. Lorillard, Inc., is the only company that owns 10% or more of Lorillard Tobacco Company's stock. Lorillard, Inc., is a wholly owned subsidiary of Loews Corporation, which has outstanding securities, including Carolina Group stock, a tracking stock, in the hands of the public.

Respondent Brown & Williamson Tobacco Corporation (a successor by merger to The American Tobacco Corporation) has the following parent corporations: British American Tobacco p.l.c. British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent The Council for Tobacco Research – U.S.A., Inc. ("CTR") is a dissolved corporation and has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Respondent The Tobacco Institute Inc. ("TI") is a dissolved corporation and does not have any parent corporations. There are no publicly held companies owning 10% or more of TI's stock.

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STATEMENT OF THE CASE

This is a diversity case, and the decisions challenged by petitioner turn exclusively upon state law. Petitioner asserted nine causes of action under California law against the respondent tobacco companies, including claims for fraud and related product-liability theories. The district court dismissed petitioner's action as time barred under California law. Pet. App. F(4). The Ninth Circuit affirmed the order of dismissal on exclusively state law grounds. *Id.* at B.

REASONS FOR DENYING THE PETITION

The primary question presented – whether the Ninth Circuit applied the correct California statute of limitations – rests exclusively upon state law and was, in any event, correctly decided below. It is therefore inappropriate for review by this Court.

The four additional questions were neither presented to, nor addressed by, the courts below. In addition, none of these questions would merit review even if they had been raised or decided below. Question two (the applicability of California's four-year statute of limitations for "unfair competition" claims) was not raised below and is a pure state law issue. Question three (whether two of the respondents should be considered "manufacturers" or "sellers" of tobacco products) was not raised below and is irrelevant to petitioner's ability to evade the statute of limitations on his claims. Question four (whether the decisions below are consistent with recent federal preemption decisions) is not properly before the Court, because the parties did not address, and the lower courts neither addressed nor decided, whether any of the state law claims raised by petitioner are preempted by federal law. Question five – whether the dismissal

of a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure violates the constitutional right to a jury trial – raises an issue not supported by law and not raised or decided below. None of these questions merits review by this Court.

I. PETITIONER'S FIRST QUESTION RAISES SOLELY STATE LAW ISSUES.

The Ninth Circuit affirmed the dismissal of petitioner's state law tort claims, based on California's one-year statute of limitations for all claims for personal injury. Cal. Civ. Proc. § 340(3). Petitioner argued below that his common law claims sounded in fraud and were therefore governed by California's three-year statute of limitations for fraud. The Ninth Circuit held that California Code of Civil Procedure section 340(3) "bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked." Pet. App. B9 (citing cases). Numerous California state and federal cases are in accord.[1]

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1. *See, e.g., Nodine v. Shiley Inc.*, 240 F.3d 1149, 1153 n.2 (9th Cir. 2001) (noting that it is well settled in California that "the applicable statute of limitations for fraudulent concealment claims in personal injury actions is Cal. Civ. Proc. Code § 340(3) (one year), not Cal. Civ. Proc. § 338 (three years)"); *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 530 (9th Cir. 1985) (holding that Cal. Civ. Proc. § 340(3) applies to all claims for personal injury "regardless of the legal theories upon which the action is based"); *Edwards v. Fresno Cmty. Hosp.*, 113 Cal. Rptr. 579, 580 (Ct. App. 1974) (one-year period covers all claims for bodily injuries and all "infringements of personal rights as opposed to property rights"); *Goldrich v. Natural Y Surgical Specialties, Inc.*, 31 Cal. Rptr. 2d 162, 166, 169 (Ct. App. 1994) (applying one-year period to numerous claims for personal injury, including fraud claims).

Petitioner offers no argument supporting review of this question, which turns exclusively upon the applicability of California statutes of limitations to claims brought under California law. Petitioner cites no authority for a view contrary to the conclusion of the courts below. There is no conflict between the Ninth Circuit view and state decisional law, no conflict in the Ninth Circuit, and no conflict between the circuits.

This Court has repeatedly emphasized that it will not review diversity cases that raise only state law issues. *See, e.g., Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *see also* Sup. Ct. R. 10 (certiorari "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). Review of petitioner's first question is therefore not warranted.

II. PETITIONER'S SECOND QUESTION WAS NOT RAISED BELOW AND RAISES ISSUES SOLELY OF STATE LAW.

Petitioner alleges for the first time before this Court that the Court of Appeals failed to apply the four-year limitations period that California law provides for "unfair competition" claims, under California Business and Professions Code section 17208.[2] Again, this question turns exclusively upon an application of state law.

Petitioner did not make this argument in any form in the lower courts. Petitioner never alleged that his complaint could be construed

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2. The statute of limitations at California Business and Professions Code section 17208 – which petitioner now argues should have been applied to his common law tort causes of action – governs only claims brought under California's unfair competition law, Business and Professions Code section 17200 *et seq*. *See* Pet. at 20 (so stating, and citing cases). Petitioner cites no authority for the application of this statute to the claims asserted in his complaint.

as asserting claims for "unfair competition." Rather, he repeatedly (and properly) characterized his complaint as setting forth nine common law causes of action: "Strict Liability, Negligence, Breach of Express Warranty, Breach of Implied Warranty, Fraud, Intentional Misrepresentation, Conspiracy to Commit Fraud and Misrepresentation, Equitable Relief and Intentional Infliction of Emotional Distress." Pet'r Opening Br. to the Ninth Circuit, at 4. Petitioner never suggested that these or any other claims in his complaint were subject to the four-year limitations period that California law provides for unfair competition claims.

This question is inappropriate for review by this Court because it raises exclusively state law issues. Moreover, the Court has repeatedly emphasized that it will not consider arguments that have not been previously raised by the parties, or passed on by the courts below. *E.g.*, *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988). Accordingly, review of this question should be denied.

III. PETITIONER'S THIRD QUESTION WAS NOT RAISED BELOW AND IS IRRELEVANT TO THE LOWER COURTS' DECISIONS.

In his third question, petitioner contends that the Ninth Circuit erred in "failing to recognize" that two defendants named in petitioner's complaint – the Council for Tobacco Research–U.S.A., Inc. ("CTR") and the Tobacco Institute, Inc. ("TI") – "are only trade associations that *do not* manufacture or market tobacco products." Pet. at i (emphasis in original).

Petitioner did not raise this issue below, and it was neither mentioned nor decided by the Ninth Circuit. The question whether certain of the respondents "manufacture" or "sell" cigarettes might be of some relevance to the state law question whether such

respondents could have any liability for petitioner's injuries; but that substantive question is of no relevance to the decisions of the district court and the Ninth Circuit that petitioner's action was not timely filed under California law.

Petitioner provides no explanation or argument as to how this issue can be before the Court, or as to why review would be appropriate. *See* Sup. Ct. R. 14(h) (stating that every petition for a writ of certiorari must contain "[a] direct and concise *argument* amplifying the reasons relied on for allowance of the writ" (emphasis added)).

IV. PETITIONER'S FOURTH QUESTION WAS NOT RAISED BELOW AND IS IRRELEVANT TO THE DECISIONS BELOW.

Petitioner's fourth question presented is whether the dismissal of his claims conflicts with the decision of this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and the opinion of the California Supreme Court in *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994).

Petitioner did not raise this issue below, and it has no bearing upon the issues decided by the Ninth Circuit. Both *Cipollone* and *Mangini* dealt with the extent to which the Federal Cigarette Labeling and Advertising Act ("FCLAA") preempts certain state law claims. The Ninth Circuit's decision does not address preemption at all, and does not rely upon or conflict with *Cipollone* or *Mangini*. No party below asked the Ninth Circuit to decide whether FCLAA preempted petitioner's claims. Indeed, the dismissal of petitioner's claims on statute of limitations grounds made potential preemption issues moot, thus avoiding even the possibility of a conflict with *Cipollone* or *Mangini*.

V. PETITIONER'S FIFTH QUESTION WAS NOT RAISED OR CONSIDERED BELOW.

In his final question presented, petitioner argues that resolution of a statute of limitations issue on a 12(b)(6) motion violates the Seventh Amendment right to trial by jury. Not only was this argument not raised or considered below, it has been repeatedly rejected by this Court. *See Ex parte Peterson*, 253 U.S. 300, 310 (1920) ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined."). *See also Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (directed verdict does not violate the Seventh Amendment); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-98 (1931) (retrial limited to question of damages does not violate the Seventh Amendment); *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate the Seventh Amendment). Were it otherwise, any order of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) would be unconstitutional.

Petitioner's contention was not presented or preserved below and does not merit review by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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